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ORDER

BADGER RANCH, CHIARA RANCH, and DANIEL E. & EDDYANN U. FILIPPINI,	)	NV-06-13-01
	)	Appeal from Field Manager's Final Decision temporarily closing the North Buffalo and Copper Canyon Allotments, Mount Lewis Field Office, Nevada
Appellants	)	
v.	)	
BUREAU OF LAND MANAGEMENT,	)	
Respondent	)	

Respondent's Motion for Summary Judgment Granted

I. Summary

Now pending and fully briefed are the parties' cross-motions for summary judgment regarding a Bureau of Land Management ("BLM") decision to temporarily close the Battle Mountain Complex to all grazing until the end of a drought plus one growing season. Appellants have not raised disputed issues of fact as to the accuracy or reliability of BLM's monitoring data or the rationality of BLM's conclusions based on that data. Instead of focusing on BLM's technical analyses of range conditions and the appropriate management response, Appellants raise non-technical arguments including, among other things, (1) that BLM erred in relying upon drought response triggers in a district-wide drought management environmental assessment ("EA") because no decision record ("DR") was issued for the EA; (2) that BLM violated the National Environmental Policy Act ("NEPA") by failing to issue a DR for the EA, (3) that BLM failed to provide a rational basis for determining the duration of the drought; (4) that the decision's treatment of Appellants' exchange-of-use ("EOU") agreements is too vague; and (5) that BLM failed to adequately consult with Appellants. Because the undisputed material facts show that BLM's technical analyses of range conditions and the appropriate management response were reasonable and substantially complied with the law and

because BLM is entitled to summary judgment on or dismissal of the issues raised by Appellants in their briefs, summary judgment must be granted in BLM's favor.

II. Background

The appealed decision dated May 23, 2013, temporarily closes the North Buffalo and Copper Canyon Allotments to livestock grazing because of severe drought conditions. Those conditions prompted BLM to put the decision into immediate full force and effect.

The two allotments are located in BLM's Battle Mountain District and are collectively known as the Battle Mountain Complex ("BMC"). The BMC encompasses 204,497 acres, of which approximately 117,491 acres are public lands. The Appellants control a large amount of private land within the BMC for which they have exchange of use ("EOU") agreements. The BMC does not have any internal fencing to separate the allotments, the private from public land, or otherwise divide the BMC.

The BMC grazing permittees are Ellison Ranching Company, a sheep operation, and Appellants Badger Ranch and Chiara Ranch, which function as a single cattle operation. Appellants Daniel and Eddyann Filippini are the owners of the two ranches. Appellants' total active permitted use and EOU in animal unit months ("AUMs") are 3,760 and 4,313, respectively. They are authorized to graze year round.

The BMC consists of two distinct topographic areas: the "valley and foothills" and the "mountain use area" ("MUA"). The MUA contains significant riparian and wetland zones and provides important habitat for wildlife, including all of the critically important sage-grouse Preliminary Priority Habitat ("PPH") in the Battle Mountain Population Management Unit ("PMU"). A 2006 report found that close to 50% of the riparian habitat in the Battle Mountains was degraded and largely unusable for sage-grouse and their brood, with poor condition riparian habitat a limiting factor for reproductive success and a primary cause of population decline for the local sage-grouse population.

On January 10, 2012, BLM sent a letter to Appellants and the other permittees of the BMC notifying them that drought conditions appeared to be imminent and encouraging them to work with their assigned rangeland management specialist to identify temporary changes in grazing use to mitigate the effects of the drought for the 2012 grazing season. They were cautioned that BLM would take appropriate

action under 43 C.F.R. § 4110.3-3(b) if acceptable voluntary adjustments were not requested. BLM also indicated that it would develop an environmental assessment to identify and analyze management alternatives to address drought conditions.

On April 13, 2012, BLM sent a letter to the interested public seeking input on the district-wide drought management EA. In response to Appellants' comments, BLM made some changes. In June 2012, BLM issued the EA, with attachments that included a Drought Detection and Monitoring Plan and a Drought Management Plan. These documents discuss "drought indicators" to identify areas affected by drought, "drought response triggers" to determine when action is needed to mitigate drought effects, and a range of possible "drought response actions" for implementation when the drought response triggers are found to have been met or exceeded. BLM also issued a Finding of No Significant Impact ("FONSI") based on the EA.

On August 3, 2012, BLM toured the BMC with the permittees' representatives. They found that stubble height triggers had been exceeded. The report documenting the impacts of livestock grazing observed during the tour states:

> Cattle are solely targeting the riparian areas and causing severe degradation. Nearly all riparian areas are on a downward trend. Some have been permanently degraded to a new lower potential. Immediate removal of cattle is imperative to reduce the amount of permanent riparian degradation. The area should be rested for at least a year to allow recovery. Grazing in riparian areas should not be allowed when meadow soils are fully saturated. Exclosures around key wetlands would benefit the range in the long-run.

The field observations and monitoring data led BLM and Appellants to follow a drought grazing plan for the rest of the 2012 grazing season. They contemplated reducing stocking levels and keeping cattle out of the MUA by pushing them off with riders and hauling water to private land portions of the BMC to draw and hold cattle on the flats. Also, BLM informed Appellants of the need to defer grazing in the MUA from April 1 through September 30, 2013 and warned them that if they didn't apply for non-use and defer grazing in the MUA for the 2013 grazing season, that BLM would have to close portions of the BMC.

In November 2012, BLM collected utilization and stubble height data which showed that while cattle had not overgrazed the valley and foothills, they had

severely overgrazed the riparian areas. The riparian 4- to 6-inch stubble height trigger level had been substantially exceeded, with heights ranging from 1.7 to 3.5 inches.

After a meeting between BLM and Appellants on November 27, 2012, to develop a drought management plan for the 2013 grazing season, Appellants applied for non-use of the MUA until October 1, 2013, limiting their grazing to the valley and foothills from March 1 to September 30. Cattle drifting into the MUA would be removed within 5 days of Appellants being notified or discovering them. BLM approved their application on January 10, 2013, and notified Appellants by a letter dated January 14, 2013. Appellants were reminded that 2013 grazing use would be subject to drought response triggers brought forward from the EA.

When BLM observed a lack of forage in March 2013 due to drought, BLM asked Appellants to delay turnout and reminded them that if BLM found that conditions were approaching the drought response triggers, cattle would have to be removed. Drought conditions continued and worsened, so BLM reminded Appellants again by letter dated April 15, 2013, and encouraged them to contact the assigned BLM rangeland management specialist to discuss adjustments to address the continuing drought conditions.

On April 23, BLM found 60 head of Appellants' cattle grazing in the MUA and informed Appellants of the need to remove the livestock within 5 days. On April 26, BLM monitored four non-riparian upland sites and found that one area showed slightly below average forage production, one showed extreme stunted forage growth, and two evidenced extreme drought, leading to an internal drought action recommendation that livestock be removed because of little or no forage production.

On May 1, after Appellants informed BLM that the cattle had been removed from the MUA, BLM found 78 head there. On May 3, BLM telephoned Mrs. Filippini to inform her that her cattle were still in trespass within the MUA. She said that the cattle had been pushed out of the MUA but must have moved back on their own. She also indicated that the MUA is the only place where there is feed and water. BLM warned her that if she could not keep cattle out of the MUA, then all cattle would have to be removed from the BMC. They agreed to meet on May 7 to discuss the problem.

Appellants' range consultant, Jack Alexander, called BLM a few hours after the phone conversation with Mrs. Filippini. He also stated that they were pushing

cattle out of the MUA but that the cattle must have beat them back up the mountain. BLM told him that hauling water to the flats was not an option because there is no feed on the flats. He said Appellants had started taking cattle off of the BMC and planned to remove all of the cattle within 2 to 3 weeks because there wasn't much feed left.

On May 6, BLM, accompanied by Mrs. Filippini and her son, again found Appellants' cattle in the MUA (64 head). BLM noted that plant growth seemed stunted with minimal vigor.

During the May 7th meeting, Mrs. Filippini acknowledged that cattle were returning to the MUA immediately after they were pushed out, that Appellants were considering Mr. Alexander's recommendation to remove all cattle from the BMC, that managing cattle consistent with the 2012 drought grazing plan was not possible, and that they were considering removing all the cattle from the BMC in the next several weeks. BLM informed her that a temporary closure was necessary and that BLM would be issuing a closure decision following a brief consultation process for members of the interested public.

On May 13-14, BLM found over 200 head in the MUA and conducted monitoring showing severely degraded riparian areas. Utilization levels exceeded the drought response triggers, with key riparian species having been grazed to less than 2 inches everywhere they were measured. Weeds were replacing soil stabilizing riparian species and streambanks were altered by livestock enough to change the channel morphology. The lack of residual vegetation from 2012, combined with the lack of new growth in 2013, increased the amount of bare ground. The paucity of forage in the valley and foothills sabotaged Appellants' plan to use water hauling as a mechanism for keeping cattle out of the MUA.

In a May 2013 report entitled "Battle Mountain Complex Monitoring Report, Spring 2013" ("May 2013 Report"), BLM summarized conditions as follow:

> Vegetation within the BMC is displaying various signs of drought stress. There is significant lack of forage and water available for wildlife and livestock. The vegetative growth this spring was considerably reduced, with limited to no growth observed within some areas of the BMC. Much of the vegetation is exhibiting reduced leaf growth, seed head development with induced senescence prevalent across the allotments. The lower elevations are exhibiting the most severe signs of drought stress. Water in the allotment is

> limited to the [MUA] and cattle are concentrating in these crucial riparian zones. Concentration of livestock around the remaining water sources has led to utilization levels that exceed the Drought Response Triggers analyzed in the [EA].

On May 16, BLM sent out a consultation letter to the interested public informing them that BLM contemplated closing the BMC to grazing and offering them the opportunity to submit written comments within 7 days of the date of the letter. A copy was sent to Appellants. On May 20, BLM found 56 head in the MUA.

On May 23, BLM telephoned the Filippinis to inform them that a decision was going to be signed and mailed that morning and that they could pick up a courtesy copy that day. Appellants did so and the appealed decision was issued that day. Appellants were developing but had not yet submitted comments when the decision was issued.

The decision required removal of all livestock from the BMC within 10 days of receipt of the Decision. As Appellants signed for the mailed copy of the decision on May 25, removal was required by June 4.

The decision was issued as a full force and effect decision because "all viable Drought Response Actions short of closure have been exhausted." The decision

> [t]emporarily close[s] the BMC to livestock grazing for the duration of the drought plus one growing season (April 1-July 15), with the exception of restricted trailing use for sheep through the area identified on the enclosed map . . . . This Decision would remain in effect through one growing season following the official determination by the U.S. Drought Monitor in conjunction with the Vegetation Drought Response Index (VegDRI) that the drought has ended within the area of the BMC.

BLM also approved a Determination of NEPA Adequacy ("DNA") for the decision, identifying the EA as the applicable NEPA document and other relevant documents, including the May 2013 Report. The DNA states:

> The current proposed action is to implement, either separately or in combination, Drought Response Actions described in the Drought Management Plan during drought. Temporary closure of grazing allotments for the duration of the drought plus one growing season, to

> allow for resource recovery, is one of the Drought Response Actions described in the Drought Management Plan and analyzed in the [EA].

III. Discussion

A. Appellants' Allegation of Impairment or Taking of Their Water Rights

Appellants claim that BLM impaired or took Appellants' water rights in violation of Nevada State law and the Fifth Amendment to the U.S. Constitution. This office has no jurisdiction over this claim and therefore the claim is dismissed. *See Robbins v. BLM*, 170 IBLA 219, 227 (2006) (the Hearings Division, as a component of the Office of Hearings and Appeals, is not a court of general jurisdiction empowered to hear, rule, or grant relief in all cases involving allegations amounting to violations of civil, criminal, or constitutional law, but only those cases required by law to be conducted pursuant to 5 U.S.C. § 554 and other cases arising under the statutes and regulations of the Department), and cases cited therein; *Silvino Ortiz v.* BLM, 126 IBLA 8, 14 (1993) (determinations based on interpretations of State law are beyond the authority of the Department).

B. Summary Judgment Standards

The standards for evaluating a motion for summary judgment are set forth in 2 Moore's Federal Practice § 56.15[8] as follows:

> The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded. . . . It is not the function of the trial court at the summary judgment [stage] to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party . . . .

Consistent with the foregoing, the Interior Board of Land Appeals (Board) has stated:

> To obtain summary judgment there must be no true issue of fact. *Friends of the Earth v. Carey*, 401 F. Supp 1386 (S.D.N.Y. 1975); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945). When contemplating summary judgment all factual inferences must be

> drawn in the light most favorable to the opposing party. *S. J. Groves & Sons v. International Brotherhood of Teamsters*, 581 F.2d 1241, 1244 (7th Cir. 1978); *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976).

Larson v. BLM, 129 IBLA 250, 252 (1994). Although the regulations do not specifically authorize motions for summary judgment, the Board has long recognized the procedure as an appropriate means for resolving issues without a hearing. *See, e.g., Larson v. BLM* , 129 IBLA 250, 252 (1994); *Stamatakis v. BLM*, 115 IBLA 69, 74 (1990); *Myrtle M. Jensen Shanigan*, 29 IBLA 255, 257-58 (1977).

The civil courts provide that a party is entitled to summary judgment if there are no genuine issue of material fact and, as a matter of law, judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the moving party has meet its burden, the burden then shifts to the non-moving party to set forth by affidavit, or other means, specific facts showing that there is a genuine issue of material fact or that legally, the moving party is not entitled to judgment. *T. W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Legal memoranda are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). "An issue is 'genuine' only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). "A fact is 'material' if the fact may affect the outcome of the case." *Id.*

C. Standard of Review

Under 43 C.F.R. § 4.480(b), a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 C.F.R. part 4100. Under this standard, BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges. *Wayne D. Klump v. BLM*, 124 IBLA 176, 182 (1992). A BLM decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper. *Klump*, 124 IBLA at 182. The burden of proof is a preponderance of the evidence. *Eason v. BLM*, 127 IBLA 259, 262 (1993).

In the Taylor Grazing Act, "Congress granted the Secretary broad discretionary authority to balance the interests of those who wish to use the government's land against the need to protect the land from injury." *Public Lands*

Council v. Babbitt, 167 F.3d 1287, 1290 (1999), *aff'd*, 529 U.S. 728 (2000). Thus, an appellant must do more than merely offer a plausible alternative reflecting a contrary opinion as to the proper balance; the appellant must show that BLM's actions were irrational or unreasonable. *See Blair v. BLM*, 126 IBLA 296, 299 (1993); *Jose Talancon 1998 Family Trust v. BLM*, 174 IBLA 152, 169 (2008).

D. Issues Bearing on Whether BLM's Decision Should Be Set Aside

BLM has presented undisputed material facts showing that its technical analyses of the range conditions and the appropriate management response, i.e., the temporary closure of the BMC to all grazing, were rational, reasonable, and substantially complied with applicable law. The parties' cross-motions for summary judgment can be distilled down to the following six non-technical issues bearing upon the question of whether BLM's decision should be set aside:

> (1) whether BLM erred in relying upon the EA's drought response triggers, given that no DR was issued for the EA;
> (2) whether BLM failed to provide a rational basis for determining the duration of the drought;
> (3) whether BLM had a rational basis for concluding that less onerous drought response actions would be inadequate to protect the public range;
> (4) whether the decision's treatment of Appellants' EOU AUMs is too vague;
> (5) whether BLM failed to comply with the mandate of 43 C.F.R. § 4110.3-3(b) to consult, or make a reasonable attempt to consult, with Appellants; and
> (6) whether BLM violated the National Environmental Policy Act ("NEPA"), by basing its decision upon the EA, particularly the drought response triggers, given that no DR was issued for the EA.

Appellants have not presented argument or alleged disputed material facts with regard to any other issues.

1. Issue 1

Appellants contend that BLM failed to provide a rational basis for the determining the end of the drought, which triggers the end of the closure one growing season later. The Decision states: "This Decision would remain in effect through one growing season following the official determination by the U.S. Drought Monitor in conjunction with the Vegetation Drought Response Index (VegDRI) that the drought has ended within the area of the BMC."

Appellants' range consultant, Mr. Alexander, attested that neither the U.S. Drought Monitor model or the VegDRI model, "singularly or in combination, could provide any 'official determination' as to when a drought begins or when a drought ends." He explained that the U.S. Drought Monitor model only provides information as to different intensities, such as "Abnormally Dry," "Drought-Moderate," "Drought-Severe," "Drought-Extreme," or "Drought Exceptional." Likewise, the VegDRI model only provides information as to different vegetation conditions such as "Extreme Drought," "Severe Drought," "Moderate Drought," "Pre-Drought," "Near Normal," and "Unusually Moist." He concluded:

> BLM's [decision] does not speak as to what "intensity" from the U.S. Drought Monitor and what "Vegetation Condition" from the VegDRI would be used and applied to say when a drought begins and when a drought ends. This omission makes it impossible for any permittee or the Interested Publics to know what will be relied upon by the BLM to make its determination.

As an example of how BLM could have been more explicit, he quotes the following statement from another BLM decision with a virtually identical temporary closure duration provision: "If the Allotment area is rated Abnormally Dry (U.S. Drought Monitor) and Pre-Drought (VegDRI), the [BLM] will consider that the drought has ceased and one growing season of rest will begin." But this statement merely makes explicit the common sense and ordinary meaning of the temporary closure duration provision. The two models have various intensities of drought and intensities of non-drought. The ordinary meaning of the drought ending according to these models would be when each model shows an intensity of non-drought rather than drought for the BMC, i.e., when the U.S. Drought Monitor model reaches "Abnormally Dry" or better and the VegDRI models reaches "Pre-Drought" or better.

In other words, BLM has provided a rational and sufficiently clear basis for determining the end of the drought. Therefore, BLM is entitled to summary judgment on issue 1.

2. Issue 2

Another issue is whether BLM had a rational basis for concluding that less onerous drought response actions would be inadequate to protect the public range. Appellants suggest that there were several other alternatives but marshal no facts or

argument in this regard, except with respect to the alternative of extending the decision's 10-day deadline for removal of the cattle.

There are disputed material facts regarding the number of cattle remaining on the BMC on the date BLM's decision was issued and the amount of time reasonably necessary to allow for removal of that number of cattle. However, the cattle have all been removed now, so the sub-issue of whether the cattle removal period was reasonable is moot.

Even assuming, *arguendo*, that Appellants were to prevail on this sub-issue and this Office were to set aside the Decision and remand the matter to BLM to re-evaluate the removal period, BLM could not grant Appellants any effective relief because the cattle have already been removed. Because the issue is moot, it is dismissed from further consideration. *See Colorado Environmental Coalition*, 108 IBLA 10, 15 (1989) ("It is well established that the Board will dismiss an appeal as moot where, subsequent to the filing of the appeal, circumstances have deprived the Board of any ability to provide effective relief and no concrete purpose would be served by resolution of the issues presented.")

3. Issue 3

Appellants argue that the decision's treatment of its EOU AUMs is sufficiently vague to render the decision unenforceable because the EOU AUMs are not specifically mentioned in the decision. Instead, when identifying the AUMs to be suspended, the decision only refers to the permitted active AUMs. Appellants conclude that there is a question of whether the EOU AUMs were suspended or not, despite the following clear mandate: "This Decision temporarily closes the BMC to *all* livestock grazing . . . [and] require[s] the removal of *all* livestock grazing within the BMC within 10 days of receipt of this Decision." (Emphasis added.)

In light of this mandate and the multiple indications of "closure" or "closing" of the BMC to grazing, no reasonable person would interpret the decision as allowing any cattle to remain within the BMC. This is especially true, given the prior discussions in which BLM informed Appellants that it was going to close the BMC based, in part, on the inability of Appellants to keep their cattle out of the MUA. To the extent, if any, that the decision is less than crystal clear, it is immaterial because the decision's intent is clearly to close the BMC to all grazing. Therefore, BLM is entitled to summary judgment on issue 3.

4. Issue 4

Appellants contend that BLM's decision should be set aside because BLM failed to comply with the mandate of 43 C.F.R. § 4110.3-3(b) to consult, or make a reasonable attempt to consult, with them. The regulations leave to BLM's discretion the manner in which it consults or attempts to consult.

BLM consulted with Appellants many times regarding how to address the drought conditions and they had ample opportunity to submit suggestions. The analysis is complicated by the fact that BLM offered Appellants in its May 16, 2013 letter a final opportunity to submit comments and then issued its decision the morning of May 23, 2013, hours before the seven-day comment period ended at the close of business that day.

Mr. Filippini attests that he was developing comments which he intended to submit before the seven-day period ended. However, he doesn't identify the content of those comments or any new information that he would have imparted to BLM other than information bearing upon the reasonableness of the duration of the 10-day period which BLM allowed Appellants for removal of the cattle from the BMC. In other words, even assuming, *arguendo*, that BLM failed to adequately consult with Appellants, they have not shown that they were prejudiced, except perhaps with respect to the establishment of a reasonable duration for cattle removal.

In the absence of prejudice, the failure, if any, to adequately consult with Appellants would be harmless error. *See Rudnick v BLM*, 93 IBLA 89, 92-93 (1986) (failure to provide a 15-day protest period was harmless error). The only potential prejudice shown in this case pertains to the reasonableness of the 10-day period for cattle removal. But, as previously found, the issue of whether the cattle removal period was reasonable is moot. A remand to consult on the cattle removal period would serve no purpose because the cattle have already been removed. Under these circumstances, BLM's failure, if any, to adequately consult with Appellants was harmless error, *see, e.g., Rudnick*, 93 IBLA at 96 (an error is harmless where a remand would serve no purpose), and BLM is entitled to summary judgment on issue 4.

5. Issue 5

Appellants contend that BLM violated NEPA by basing its decision upon the EA, particularly the drought response triggers, given that no DR was issued for the EA. This contention is based upon a false premise, namely that NEPA applies to

a decision, such as the appealed decision, which does nothing to alter the natural physical environment, prevents human interference with the environment, and thus promotes the purpose of NEPA to protect the physical environment.

In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the court ruled that NEPA did not apply to the Secretary of the Interior's designation of critical habitat for the spotted owl, an endangered species. The court reasoned that "NEPA procedures to not apply to federal actions that do nothing to alter the natural physical environment." *Id.* at 1505. Although the critical habitat designation would affect the environment by limiting development and fostering maturation of old-growth forests, the "[t]ouchstone is not *any* change in the status quo, but change effected by humans." *Id.* at 1506. In other words, "when a federal agency takes an action that prevents human interference with the environment, it need not prepare an [environmental impact statement]." *Id.* The court added that such actions promote the purpose of NEPA to protect the physical environment, so there is no need to alert interested parties of potential adverse environmental impacts. *Id.* at 1505.[1]

The Board has cited *Douglas County* with approval, stating:

> We find the Ninth Circuit Court of Appeal's determination in *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), to provide far better guidance for the situation presented here. The Court held: "When we consider the purpose of NEPA in light of Supreme Court guidance on the scope of the statute, we conclude that an EA or an EIS is not necessary for federal actions that conserve the environment."

Jennifer J. Walt, Box D Ranch, 172 IBLA 300, 310-11 (2007).

Where a decision temporarily closes an area to certain human activity so as to conserve the environment, NEPA does not apply to that decision. *See American Sand Assn. v. U.S. Department of the Interior*, 268 F.Supp.2d 1250, 1253 (S.D. Cal. 2003) (NEPA review was not necessary for the Department's decision to temporarily close an area to off-road vehicle use because it was a federal action taken to conserve the environment). In the present case, BLM temporarily closed the BMC to a human

[1] While some courts have chosen not to follow the Ninth Circuit's interpretation in *Douglas County* of the applicability of NEPA, *e.g., Catron County Bd. of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429(10th Cir. 1996), Ninth Circuit precedent governs this case because the BMC lies within the Ninth Circuit.

activity -- grazing cattle – to conserve the environment. Therefore, NEPA does not apply to its decision and BLM did not violate NEPA.

Even assuming, *arguendo*, that NEPA applies, the absence of a DR for the EA does not render BLM's reliance on the EA violative of NEPA, contrary to Appellants' contention. Appellants cite to the BLM NEPA Handbook, H-1790-1, which states:

> Neither the EA nor the FONSI is a decision-making document. Decisions regarding proposed actions analyzed in an EA are documented in accordance with program-specific requirements. While *the NEPA does not require a specific decision document regarding actions for which an EA has been completed,* the BLM has chosen to use the "DR" (DR) to document the decision regarding the action for which the EA was completed. The decision cannot be implemented until the DR is signed.

Id. at 84 (emphasis added). BLM's own handbook states that NEPA does not require a decision document.

Consistent with this statement, the Department's NEPA regulations do not contain a requirement to issue a DR. *See* 43 C.F.R. part 46. In turn, this is consistent with the fact that the Council of Environmental Quality regulations implementing NEPA require a "public record of decision" for an EIS, 40 C.F.R. § 1505.2, but not for an EA. Appellants have not cited and this Office could not locate any authority supporting the proposition that NEPA is violated if BLM relies upon an EA for which no DR has been issued. Consequently, BLM is entitled to summary judgment on issue 5 because NEPA does not apply to the appealed decision and, even if it does apply, BLM did not violate NEPA in relying upon an EA for which no DR was issued.

6. Issue 6

The lack of a DR for the EA is the basis for another of Appellants' arguments: that in the absence of a DR, the EA's drought response triggers were directives/objectives that did not legally exist and therefore that BLM erred in relying upon those triggers. Appellants cite *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998), in support of this argument. In that case, the Board held:

> An appellant challenging the accuracy of a range study must show not just that the results of that study could be in error, but that they are erroneous. Error in BLM's findings can be established only by showing that BLM's range study methods are incapable of yielding accurate information, that BLM materially departed from prescribed procedures, or that a demonstrably more accurate study has disclosed a contrary result.

Id. That case is inapposite because Appellants are not attempting to make any of the showings necessary to establish error under that holding, such as that the drought response triggers are incapable of yielding accurate results. The *West Cow Creek Permittees* decision does not address the issue raised by Appellants: whether BLM may base a decision upon drought response triggers that have not been approved in a prior decision.

The standard for evaluating whether BLM's reliance on the triggers should be upheld is whether it was rationale and in substantial compliance with applicable law. That law does not require prior approval of range management tools such as triggers before adoption in a site-specific decision.

BLM has discretion to adopt those tools in a site-specific decision such as the appealed decision or in a decision of wider scope. To the extent, if any, that BLM was bound by its NEPA Handbook to issue a DR for the EA, the failure to issue a DR does not preclude BLM from adopting use of the triggers in the site-specific decision now challenged by Appellants. Therefore, BLM is entitled to summary judgment on issue 6.

IV. Conclusion

Based upon the foregoing, **BLM's motion for summary judgment is granted and Appellants' appeal is dismissed.**

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 C.F.R. part 4, Subparts B and E (see enclosed information pertaining to appeals procedures).

See page 17 for distribution.

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